CONFEDERATE CONGRESS.

Arkansas Contested Election.

JOHNSON VS. GARLAND.

EXPOSITION AND ARGUMENT BY THE COUNSEL OF MR. JOHNSON.

CONTESTED ELECTION.

JOHNSON vs. GARLAND,

This is a case of contest about a seat or a membership in this House, arising upon the returns of the officers of the State Government.

The Constitution of the Confederate States declares that "each House" of Congress "shall be the judge of the election *returns* and qualifications of its own members." The terms *elections* and *returns* do not here mean the same thing, and the present is a case on the *returns* of a member, and not properly of the election in contradistinction to the returns thereof.

The Constitution of the Confederacy declares that "the time, place and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, *subject to the provisions of this Constitution;* but the Congress may at any time, by law, make or alter such regulations, except as to the times and places of choosing Senators." Nothing is here said about returns.

The Constitution of the United States contained the same provision, except the clause "subject to the provisions of this Constitution," and the Congress of the United States in the year ——, enacted that each State should be divided by the Legislature thereof intothe number of districts it was entitled to members in the House of Representatives, and that one member of Congress should be elected from each district.

The Provisional Congress of the Confederate States on the 9th day of February, 1861, enacted that "all the laws of the United States of America in force and in use in the

Confederate States of America on the first day of November, 1860, and not inconsistent with the Constitution of the Confederate States, be and the same are hereby continued in force until altered or repealed by the Congress."

The State of Arkansas would have been entitled to four members in the next Congress of the United States, and was consequently entitled to the same number in the House of Representatives of this first Congress of the Confederate States under our permanent Constitution and the Legislature of Arkansas, accordingly divided the State into four Congressional Districts, and fixed the election on the 6th day of November.

The States had been left by the Congress of the United States to prescribe the manner of the election, with the exception of the requirement already mentioned, that it should be had by Congressional Districts, and it is obvious that the States of the Confederacy were left with the same power.

This third district is one of the four into which the State was so divided, and was composed of 13 counties, the county of Pulaski, Saline, Dallas, Calhoun, Union, Jefferson, Bradley, Drew, Ashley, Chicot, Desha, Prairie, and the county of Arkansas. The election was on the 6th of November for the election of one member of Congress.

In this state of things it has been assumed, whether correctly or not we will not now enquire; that the statutes of Arkansas, enacted while the State was one of the United States, was the law which fixed the manner in which this election was required to be conducted.

(It will, however, be noticed that the State Legislatures are not expressly given power to prescribe the manner of the *returns* of the members, and if such power was vested in them by the Constitutions it was by mere implication. And it will be recollected that the Constitution of the Confederate States expressly declares that the power to prescribe the time, place and manner of the election, shall be subject to the Constitution of the Confederacy, and that in this Constitution it is enacted, that each House shall be the judge of the *returns* as well as the election, and qualifications of its members. And certainly in such case, the judgment of the House exercised under such expressed grant ought not to be controled by the act of the State officer, thus performed under an authority derived to him by mere implication. It

may be that these returns ought to be considered as *prima facia* evidence, and sufficient until contested. But whenever they are questioned they must certainly occupy the lowest position in that class of evidence, and must be overturned by any proof which will satisfy the mind that they are erroneous.)

(*Election in the Townships.*)

We will now proceed to state the several provisions of this law of Arkansas, which it has been supposed are applicable to this case.

There being no question made here in respect to the votes recorded, it will be sufficient to state the ordinary mode of election, in general terms. It is held in the townships of the respective counties, at the place in each fixed by the county court; but the court may divide any township into two or more election precincts, and appoint the place in each for the election; it is superintended at each place by three judges of election, with two clerks: each of whom keeps his own poll book: the votes are cast by ballot. The electors present themselves at the polls, or before the judges; the supposition is in succession; here each delivers his ballot or ticket to one of the judges, it has written or printed within its fold the name of the person voted for, and of the office into which he is to be elected. The judge thereupon pronounces aloud the name of such elector, and all being found right, each of the clerks enters his name in the column on his poll book and affixes thereto the proper number, according to the order in which the act occurs. The ticket is then endorsed by this number and deposited in the ballot box, and so on until all the votes have been cast, or the time for receiving of them has expired; then the poll books are closed.

Section 16. It shall be the duty of the clerks of the elections to register the names of each and all electors in the order in which they present their tickets, placing opposite each name its appropriate number.

Sec. 47. At the closing of the polls the poll books shall be signed by the judges and attested by the clerks, and the names contained shall be counted and the number set down at the foot of the *poll books*.

This poll book is retained by the judges for the inspection

of all persons. This provision was obviously intended to enable any party to ascertain whether any person not entitled to vote at the election had in fact voted, and to prove the fact in a contest of the election on this ground, or involving this question.

It is subsequently provided that after the election has been closed the judges shall envelope all the ballots under seal, and return the same to the county clerk, and that the envelope shall in no event be opened except in cases of contested election In this mode, it will be ascertained for whom the illegal voter cast his vote.

Thus much for the election, we will now proceed to state the mode of ascertaining the result.

(*Ascertainment of Result in Townships.*)

We have already seen how the polls were closed by the signatures of the judges, and the election thus ended.

Immediately these poll books are thus closed and signed, the judges are directed to open the ballot-box, and with the assistance of the clerks, ascertain the number of votes given for each of the candidates for the respective offices, which had to be filled by the election. But we will give the words of the law.

Sec. 48. After the poll-books are signed, the ballot-box shall be opened and the tickets or ballots therein contained shall be taken out, one by one at a time, by one of the judges, who shall read distinctly, while the ticket remains in his hands, the name or names contained therein, and then deliver it to the second judge, who shall examine the same, to see that there be no mistake, and pass it to the third judge, who shall examine and carefully preserve the same. The same method shall be observed in respect to each of the tickets in the ballot-box, until the number of tickets taken out of the ballot-box are equal to the names in the poll-books.

Sec. 49. The clerks of the elections shall enter on a list, or poll-book, in separate columns, under the name or names of the persons voted for, the number of votes given for each person, as read by the judges; and shall also write out on said *list or poll-book*, in a legible hand, the number of votes given to each person respectively.

EXPOSITION AND ARGUMENT.

It is manifest the document here called a list or poll-book is not the document made by the clerks in the progress of the election. The first contained only the names of the electors, and the figures annexed denoting the order in which he voted, corresponding to the number endorsed on the ballot delivered by him and deposited in the ballot-box. The second one here mentioned contains only the names of the candidates, with the offices for which they were candidates, each standing at the head of a column, with figures under each denoting the number of the votes he received.

(*Return from the Townships.*)

SEC. 53. After the examination of the tickets or ballots shall be completed, the number of votes for each person shall be enumerated, under the inspection of the judges, and set down at the foot of the columns in the list or poll-books, and be publicly proclaimed to the people present. Page 472.

SEC. 54. The judges shall certify under their hands, the number of votes given to each person, and the office for which such votes were given, which shall be attested by the clerks.

This is the *return* of the election in the township or election precinct, made by the judges thereof to the clerk of the county court.

It is not stated whether the certificate or return of the judges shall be annexed to these polls, but it is obvious that this poll-book constitutes an appendage, and goes up to the clerk's office with the return. It was intended for a check, it is supposed, and to afford a means of correcting any error in the enumeration or addition of the votes committed by the judges, but that both documents, the poll-book, and comprehensive and final return of the judges were required to be sent up to the clerk for this purpose, is manifest in the following section:

SEC. 58. If any judge of election in any township, whose duty it may be, should fail to deliver to the clerk of the county court the *return* and poll-book of said election within *three* days, as prescribed by law, on the *fourth* day the clerk of said court shall despatch a messenger to bring up the same.

It is here manifest that these returns of the judges of the

elections in the townships are the documents on which the clerk of the county court and the two justices or householders make up their abstract and return of the votes of the county in every such election.

This work at the court-house of the clerk and his two associates, is thus directed by the statute.

SEC. 60. On the *fifth* day after the election, except in cases provided for in sec. 58, *and in such cases, on the seventh day*, or sooner, if all the returns have been received, the clerk of the county court shall take to his assistance two justices of the peace of the county, if they can be conveniently had, and if not, then two *householders having the qualifications of electors*, and shall proceed to open and compare the several election *returns* which have been made to his office, and make abstracts of the votes given for the several candidates for each office, on separate sheets of paper. Page 473.

SEC. 62. In case the clerk of the county court shall take to his assistance householders instead of justices of the peace, to open and compare the returns of any election, such householders, before entering on the duties, shall take an oath before the clerk, faithfully and impartially to discharge their duties. Page 473.

SEC. 63. Each clerk in comparing the returns of election, shall do it publicly in the Courthouse or in the place in which the courts are usually held, first giving notice of the same by proclamation at the door.

The prescriptions of this Section, it may be said, are merely directory, but they show that a solemnity in performing the work was required, and we will presently show that the essential requirements of the statute were certainly omitted. The document which follows is the only production on this occasion relied on as evidence by the honorable sitting member with any color of propriety of the vote of the county of Arkansas. We give a literal copy:

"An abstract of the returns of election held in Arkansas county, State of Arkansas, on Wednesday, the 6th day of November, 1861, for a Representative to the Congress of the Confederate States of America for the third district, as appears from the returns made to this office." ———— What office?

"John C. Murry received ninety-three votes.

A. H. Garland received one hundred and seventy-five votes.

S. F. Arnett received six votes.
W. P. Grace received eight votes.
J. P. Johnson received seventy-three votes.
Thos. S. James received one vote.
B. C. Harley received ten votes.

I, Joseph H. Maxwell, Clerk of the Circuit Court and *ex officio* Clerk of the County Court in and for the County of Arkansas, do hereby certify that the above statement of the polls of the election held in said county, on the 6th day of November, 1861, is a true *copy*, according to the poll-books returned and filed in my office according to law.

Given under my hand this 13th November, 1861.

(Signed,) JOSEPH H. MAXWELL,
B. B. QUATERMONS, *Dep't Clerk.*

There is, then, it is supposed below on the same paper, a certificate, signed by the names, Louis Thompson, J. P., and A. H. McDonald, in the following words:

We, the undersigned, do hereby certify that the above is a correct abstract of the returns made to this office.

Given under our hands this 13th November, 1861.

(Signed,) LOUIS THOMPSON, *J. P.*,
A. H. McDONALD.

We affirm that this paper is insufficient, and nought for several defects.

It is not by the proper persons duly qualified, for these reasons:

1. The statute requires the work shall be done and certified by the clerk, not by him or his deputies, and the other two persons mentioned. There is an enactment of the Legislature, that deputy clerks may, in the name of their principals, perform the duties required of their principals; and such, it is supposed, was the common law. But it is submitted that the duties here meant, are the duties as clerk of the court, as the ministerial officer thereof, and not duties altogether different, conferred on them by a law not in relation to clerks or their courts. In such cases the term of office is used merely to denote the person who occupies the position. There is abundant reason for this construction. It can hardly be supposed that the Legislature intended to assign this important duty, including the choice of his associates in it, to any inferior deputy who may have been admitted;

and it is supposed that this case illustrates the propriety of this intrepretation of the enactment.

2. The statute prescribes that the clerk of the county court shall take to his assistance two justices of the peace of the county, or two householders, having the qualifications of electors. The certificate to the abstract is signed Louis Thompson, J. P. The J. P. may signify Justice of the Peace, but it is not said of what county Mr. Thompson is a justice, and is not said that he had been chosen by the clerk, or acted with him in making the abstracts or return.

3. Immediately below the name of Louis Thompson is found a name, A. H. McDonald, without addition or prefix, and there is nothing whatever to show that he was either a householder, or had the qualifications of an elector.

But this Mr. McDonald was neither sworn nor affirmed to perform this duty.

The statute we have seen expressly requires by a separate section that the householders shall take an oath faithfully and impartially to discharge their duties, and it ought certainly to appear in some form that this requirement had been observed; whereas nothing of the sort appears.

But the certificate is insufficient by whomsoever given. The certificate of the clerk here is of his own separate act; and the certificate of Mr. Thompson and Mr. McDonald is a separate act of their own. Two certificates are on the same paper, but they are distinct things, and do not import that the persons who signed the two had acted together in the work. The statute manifestly requires that the work of examining the returns and of making up this abstract shall be the joint operation of all three of the persons. It will be sufficient if the document so produced is signed by two of them. But whether signed by two or the three, it must purport to be the joint act and production of them all.

(*Return of Electors of President.*)

We will mention here, for the purpose of illustration, another document produced by this deputy clerk in his office on the same day. It ought to have been an abstract and return of the votes at the several precinct elections of the County of Arkansas for electors of President and Vice-President. We will see what it was in fact, here follows a copy:

EXPOSITION AND ARGUMENT.

Abstract from the poll-books of the general election held in and for the County of Arkansas, in the State of Arkansas, on Wednesday, the sixth day of November, 1861, for electors to elect a President and Vice-President for the Confederate States of America:

Edward Cross,	
David Walker,	
John R. Hampton,	
H. L. Gunstead,	Received 379 votes.
W. C. Bensens,	
W. W. Mansfield,	
R. M. Gains,	

I, Joseph H. Maxwell, Clerk of the Circuit Court, and, *ex officio*, Clerk of the County Court in and for the county of Arkansas, do hereby certify that the above statement of the polls of the election, held in said county on the 6th day of November, 1861, is true, according to the poll-books returned and filed in my office, according to law.

[Seal.] Given under my hand and seal, &c.

Joseph H. Maxwell,
per B. F. Quertermons, *D. C.*

To this is annexed the certificate of Lewis Thompson and A. H. McDonald.

Here it appears that each of the candidates received 379! votes. But the work and document were so defective that on the 10th day of December afterwards the clerk himself, with the justice of the peace and householder, performed it all over again according to law, and certified the proper abstract and return. *It* shows the votes of the several election precincts of the County cast for each of the candidates, and that one of them received 511!! another 503!! four of them 512!! and the other 120 votes in the County.

(*County Returns of Election for Congress.*)

But we will return to the matter of the election of the member of Congress.

The errors and defects in the abstract return of this election made up on the 13th of November, having been discovered, the matter was now all re-examined. And

The clerk himself, with a justice of the peace and a householder, *now duly sworn*, proceeded to compare the several election returns which had been made to the clerk's office on the 13th of November, and with the full knowledge of the errors previously committed, and the necessity of having all now right, thereupon made their abstract of the votes given in the several townships for each of the candidates for Congress, and made in legal form their joint return thereof.

We give a copy of this document.

STATE OF ARKANSAS,
COUNTY OF ARKANSAS:

At an Election held at the several precincts in Arkansas County, Arkansas, on the 6th day of November, A. D., 1861, pursuant to notice, for the purpose of electing one member to Congress of the Confederate States of America from the 3d District of the State of Arkansas, whereupon the following named persons, candidates for Congress, received the number of votes opposite their respective names, viz:

NAMES OF CANDIDATES.	Cypress Bay'u Township.	Arkansas Township.	Douglas Township.	Old River Township.	Vellemont Township.	Bayou Mlin Township.	Morris Township.	Po'k Township.	Crockett Township.	Prairie Township.	La Grew Township.	Total Votes.
A. H. Garland	17	7	11	1	13	2	11	19	22	81	11	195
J. P. Johnson		9	40	39	9			35		1		133
John C. Murray		16	1		1	6		5	5		63	97
S. F. Arnett			1		1	2		3	1	1		9
William P. Grace			4		4							8
Thomas S. James						1						1
B. C. Harley										1	9	10

STATE OF ARKANSAS,
COUNTY OF ARKANSAS:

We, JOSEPH H. MAXWELL, Clerk of the Circuit Court and *ex officio* Clerk of the County Court in and for said County,

and Lewis Thompson, an acting and duly commissioned Justice of the Peace, in and for said County, and Alva H. McDonald, a householder and resident of said County of Arkansas, first being duly sworn according to law, do hereby certify that we have this day examined the poll-books of the election above mentioned, and that A. H. Garland received 195 votes; J. P. Johnson 133 votes; John C. Murray 97 votes; S. F. Arnett 9 votes; William P. Grace 8 votes; Thomas S. James 1 vote, and B. C. Harley 10 votes, and that the above is a true and correct abstract of the votes as returned from the several precincts in said County of Arkansas.

Given under our hands this 10th day of December, 1861.

Joseph Maxwell, *Clerk.*
Lewis Thompson, *J. P.*
A. H. McDonald, *Householder.*

These gentlemen then addressed to the Governor the following letter, and enclosed to him, under seal, this the true abstract and final return, and sent the packets by a special messenger. This is a copy of the letter.

"Dewitt, Arkansas, December 10th, '61.

To His Excellency Henry M. Rector, *Governor of Arkansas*, and John J. Stirman, *Secretary of State:*

We, Louis Thompson and Alva H. McDonald, who were called upon by Joseph H. Maxwell, clerk of Arkansas County, on the 13th day of November, 1861, to examine and make out an abstract of the vote cast for President and Vice-President and President electors, and also for member of Congress to represent this District, the (3) in the first Confederate Congress ask that they be permitted to withdraw the abstract that they then made out in order that they may be able to substitute the *true* and *correct* returns of the votes as found by the poll-books in the office in the County of Arkansas and State of Arkansas.

The correct return or abstract they now enclose under cover of seal, and have despatched Green C. Crossen as a messenger to deliver the same to you at office of Secretary of State at Little Rock, which they pray you to receive and count as the correct vote of the County of Arkansas as

made known by the election at the different places of voting in said County on the sixth day of November, 1861, and are to be found on file in the County clerk's office at Dewitt, the County seat of Arkansas County.

Very respectfully, &c.,

JOSEPH H. MAXWELL,
LOUIS THOMPSON,
A. H. McDONALD."

The above letter and the final return of the election mentioned in it, were both received accordingly. They were each thus endorsed:

"Arkansas County election returns for congressman for the 3d Congressional District of the Confederate States of America.

Received December 11th, at 4 o'clock, P. M.

JOHN J. STIRMAN, per
E. W. STIRMAN *Deputy*."

It is objected by the honorable gentleman, in his printed argument, that those persons had no lawful authority to perform this work, because the office had been performed on the 13th November, and that they were thereby afterwards *functus officio*. But we have shown that the work on that day was not executed by the persons then possessed of the qualifications required by law, and was, therefore, nought. It cant be necessary to stop to refute such an argument. It will only be mentioned that it cannot be inferred from the fact that it appears in this document of the 10th of December, that Mr. Thompson and Mr. McDonald was at this time possessed of the qualifications prescribed by law, that they possessed all these qualifications on the 13th November. The rule of law is that in such cases we may infer forward but not backwards. It is palpable that the fact that he was sworn on this occasion, does not warrant the inference that he was sworn, as was required by law, on the 13th November, before he fixed his name to the certificate of that date. But the universal proposition is asserted that such a defective and invalid certificate is not helped in any respect by the subsequent legal and valid return. It was nought at first and so remained.

It is hardly necessary to mention that the fact that this examination of the returns was made and the abstract

thereof made up after the day directed by the statute, is no valid objection to its effect. When an act directed to be performed at a certain time is omitted on such day, it may be executed in a convenient time afterwards, unless some lawful act shall have been performed which precludes a subsequent exercise of the power and we shall find that the act of the Secretary and Governor in making up their abstract prior to the expiration of the time limited by law, and before sufficient returns had been received from all the counties of the district, was contrary to law.

Thus much for the proceedings in the townships and at the Courthouse.

(*Abstract at Capital and Governor's Return.*)

We now proceed to what is prescribed to be performed at the Capital, and what was there done in fact by the Governor. We will copy the law:

Sec. 73. It shall be the duty of the Secretary of State, in the presence of the Governor, within *thirty* days after the time herein *allowed* to make returns of elections to the clerks of the county courts, or sooner, if all the returns shall have been received, to cast up and arrange the votes from the several counties, or such of them as may have made returns for each person voted for as member of Congress; and the Governor shall immediately thereafter issue his proclamation, declaring the person having the highest number of votes, to be duly elected to represent this State in the House of Representatives of the Congress of the United States, and shall grant a certificate thereof, under the seal of State, to the person so elected.

Now, the question here arises, from what time the thirty days here mentioned ought to be calculated, in order to ascertain the day on which the Secretary and the Governor were required to act. It may be the third day after the election—the day on which one of the judges was required to deliver the polls to the clerk. If all the returns are thus received by the judges, the day for the comparison by the clerk and his associates, is fixed on the fifth day after the election; but it is declared, in a subsequent section, (58,) that if the returns are not all received on the third day, on the fourth day the clerk shall dispatch a messenger to bring

them up, and that, in such case, the polls *shall not* be compared until the seventh day. If, in this case, the first comparison was on the seventh day after the election, November 13th, the presumption is, a messenger had been dispatched to bring up the return of some township, and it may be affirmed that the time allowed to bring up the returns of the election to the clerk did not expire until with the expiration of the sixth—preceding day.

This is supposed to be the true construction; it is symmetrical with another provision of the act, and is reasonable. It is provided by the 71st section, that if there be a failure to receive returns at the seat of government, for two days after the same *are due*, the Secretary of State shall dispatch a messenger, who shall obtain and bring them up. The time in which the returns are thus due, is calculated from the day on which the comparison of the returns is made by the clerk and his associates, and obtained by adding two days, allowed him, to deposit the packets in the post-office, and adding thereto the time for the passage of the mail. But on what day shall the Secretary assume the polls had been compared by the clerk? It may have been on the 5th or 7th day after the election, but it is palpable he ought to assume the 7th day. And it is most reasonable that he ought, in fixing the thirty days within which he is required to open the polls, to make the calculation from the day on which the returns of all the townships had been made to the clerk's office, on the supposition that he had found it necessary to send for one or more of them. The object, in each case, was to ascertain when the returns *are due* at the seat of government, and the means adopted in them both was to allow full time, and certainly the calculation ought to be made in both cases from the same event.

These two are the only constructions which it has been thought worth while to state. There is another, which would make the expiration of the day preceding the 5th day after the election, the time from which the thirty days ought to be calculated. This was the first day on which the clerk and his associates were authorized to compare the returns from the counties. On this construction, the time allowed the Secretary and Governor for the comparison of the returns of the several counties expired only with the expira-

tion of the 11th day of December, and this would be sufficient for our purpose.

But the truth is, it did not expire until the 13th of the month, and on recurring to the enactment this will be found sufficiently plain in the words of the law.

(*Calculation of the Times.*)

The words are "within 30 days after the time *allowed* to make returns of elections of clerks; not the time directed by single imperative enactment, but according to the several provisions of the statute in either of the cases therein stated, and such as will accomplish the object of the law.

It had been made the duty of one of the judges of the election to deliver the return to the clerk within 3 days after the election; but it was afterwards provided that if the return was not received on this day, the clerk should on the fourth day send a messenger for it, and that in such case the clerk and his associates should not proceed in their work until the 7th day, unless the polls had been sooner received, and therefore all the time up to the 7th day was allowed for the returns to be made to the clerk.

The words are "after the time herein allowed to make returns to the clerks." The clerks are allowed to receive the returns at any time before the abstracts shall have been made on the 7th day after the election; and the returns could not have been received unless they had been sent to the clerk, and it would seem to follow that this time allowed to make the returns extended up to a convenient time in the 7th day, on which the clerk and his associates were required to act. But we have chosen to avoid any question about the division of days, and assume that the Secretary ought to have made his calculation from the expiration of the day preceding that on which the action was to be had on these returns. This is a fair construction upon at once the words, the context, and reason of the law.

It might be supposed, on the letter of a portion of the enactment, that the Secretary and Governor might proceed at any time within these 30 days, but the clause———or sooner if all the returns shall have been received clearly shows that it was not intended that they should proceed except in the case stated until the end of this period, and what was intended was the law.

We will now state the consequences of the several constructions, and the words cannot be so wrested as to give any other interpretation to the law.

If we adopt the one first mentioned, the time expired with the 9th day of December, but according to that which we have adopted, it did not expire until with the expiration of the 13th of December, three days after the Governor had acted.

(*Digression about the "Intermediate Return."*)

We will here mention a reason why the Governor ought not to have proceeded thus prematurely which did not appear in our evidence, but was shown by the sitting member himself.

The gentleman read as evidence in his behalf the following abstract, certificates with their endorsement.

"A list of votes given on the 6th day of November, 1861, in Arkansas County, Arkansas, for Congress.

CANDIDATES.	Arkansas Post.	La Grew Township.	Cypress Bayou Township.	Prairie Township.	Crockett Township.	Polk Township.	Morris Township.	Bayou Metre Township.	Vellemont Township.	Old River Township.	Douglas Township.	Total Vote.
A. H. Garland	7	11	17	81	22	10	11	2	13	1	11	186
J. P. Johnson	9			1					9	39	40	98
S. F. Arnett				1	1			2			1	5
John C. Murray	16	63			5			6			1	
B. C. Hanley		9		1								
William P. Grace											4	
Thomas S. James								1				

STATE OF ARKANSAS,
COUNTY OF ARKANSAS:

I, Joseph H. Maxwell, clerk of the Circuit Court and *ex officio* clerk of the County Court in and for the County aforesaid, do hereby certify that I have examined the poll-books of the Congressional election held in said county, on the 6th day of November, 1861, and that the above and fore-

going abstract is a full and correct list, and that I found that A. H. Garland received 186 votes, J. P. Johnson received 98 votes, S. F. Arnett received 5 votes, J. C. Murray received 91 votes, Harley 10 votes, Grace 4 and James 1.

{ SEAL. } In testimony whereof I have hereunto set my hand and affixed the seal of my office, the 7th of December, A. D., 1861.

JOSEPH H. MAXWELL, *Clerk.*"

EXECUTIVE OFFICE,
LITTLE ROCK, Dec. 11th, 1861.

This return, made by the Clerk of the County of Arkansas, is deemed by me inadmissible, for the reasons—

1st. It was not returned within the time prescribed by law.

2nd. It was not sent in the *mode* prescribed by law.

3d. It is invalidated by the second paper, or certificate of the same date, sent me through the same channel, marked No. 2. The Clerk stated, in his No. 1, the vote of Polk township is not found in his office.

(Signed,) H. M. RECTOR,
Governor of Arkansas.

SECRETARY OF STATE'S OFFICE,
LITTLE ROCK, ARKANSAS,
February 4, A. D. 1862.

I, JOHN I. STIRMAN, Secretary of State of the State of Arkansas, hereby certify that the foregoing two pages of abstracts and returns and certificates of election, sent up by Joseph H. Maxwell, who is clerk of the Circuit court, and, *ex officio*, clerk of the County court in and for the County of Arkansas, in the State of Arkansas, and also the page attached, which contains the opinion of Henry M. Rector, Governor of the State of Arkansas, is a true, literal, and perfectly compared copy of the original documents of the same purport, now on file in this office.

{ SEAL. } In testimony whereof, I, John I. Stirman, Secretary of the State of Arkansas, do hereunto set my hand, and affix my official seal of office, on the day and year first above written.

JOHN I. STIRMAN,
Secretary of State.

There are several things upon this paper it is difficult to understand.

It is not endorsed by the Secretary of State, *filed in his office*, and is not contained in the "complete transcript of the original election returns and endorsement on file in his office in relation to the election," made out by the Secretary, and certified by him on the 13th December, and which was produced here by the contestant, but was certified by the Secretary of State on the 4th day of February, and was produced here by the sitting member as evidence in his behalf.

It was endorsed by the Governor, but it does not appear when the paper came to his hands. He says it was not returned within the time prescribed by law; but it was contended in argument by Mr. Garland that it was received prior to the 10th of December, and on this ground supposed that it might have been adopted instead of the return of the 13th November, and that he would have been thus elected by fourteen votes. The Governor said it was not sent in the mode prescribed by law, and was invalid by this second paper or certificate of the same date sent him through the same channel, marked No. 2; that the clerk stated in his number 1 (which is supposed to be this paper) the vote of Polk township was for Mr. Garland ten votes, in No. 2 he certifies the vote for Mr. Garland is not found in his office.

This paper No. 2 is not found here, it is not produced, and such a mention of such a paper can have no effect. It will be merely mentioned that this is the only allusion to an absence of the returns of the vote of any township on any occasion, and that in all the returns produced in which the townships are mentioned at all, Polk township is contained. But the truth is the whole document is nought for any purpose except for the one we mentioned.

The clerk had no more power to make this return of the election than his deputy had to make up that of the 13th of November. Clerks can only transcribe records and documents in their offices, and certify that such transcripts are true copies. They cannot ascertain their effect by induction, and certify the result. And the statutes in relation to elections do not authorize the clerk to do any act, otherwise than in conjunction with other persons, except to receive and preserve packets, and to deposit certain papers in the post-office. It is, therefore, nought; yet the honorable gentle-

man contended that by the addition of this nought to his return of the 13th November, which we have proven, is also nought, and assuming he had two certificates to Mr. Johnson's one, humourously contended that he was elected by the "best two in three, which, the world over, is considered decisive and conclusive." The humor and wit are well enough, but the logic of the argument cannot be well admired.

But this paper was endorsed by the Governor, and with the endorsement, is competent evidence to prove that the Governor had been thus informed by the clerk of the county court, that the supposed return, of the deputy clerk, of the 13th November, was erroneous, and he ought not to have proceeded to make up the abstract of the district, on the assumption that it was true, but delayed it until the expiration of the latest hour before he proceeded to action.

(*Resume of the Effect of the Returns.*)

On the 10th December, the Secretary of State and the Governor arranged and cast up the votes of the several counties of this district. In this operation they recognized the return of the vote of the county of Arkansas, of the 13th November, and accordingly set down that Mr. Johnson had received, in that county, 73, Mr. Garland 175, and B. C. Harley 10 votes; and thereupon produced the following abstract:

JOHNSON VS. GARLAND.

"In the Third Congressional District the following named persons received the number of votes set under their names, to-wit:

Counties.	Jilson P. Johnson.	A. H. Garland	B. C. Harley.	J. C. Murray.	S. F. Arnett.	W. P. Grace.	Scattering.
Pulaski.....	117	444	221	9	21	1	2
Saline.....	144	123	190	2	8	1	
Dallas.....	149	231	112		34	8	1
Calhoun.....	52	20	60	18	51	100	1
Union.....	172	343	194		1	14	2
Jefferson.....	348	70	58	98	7	105	
Bradley.....	165	73	183	136	17	99	
Drew.....	196	241	186	26	176	17	
Ashley.....	11	163	336	53	55	4	
Chicot,.....	82	161	1	38	2	1	1
Desha.....	347	22		33	3	3	
Arkansas	73	175	10	93	6	8	1
Prairie	269	91	159	2	146	2	
Total	2,125	2,157	1710	527	514	263	8

Here, it appears, Mr. Garland had received, in all the district, 2,157 votes, Mr. Johnson 2,125, and that the highest number of votes cast for any other candidate was 1,710 for Mr. Harley; it was thereupon announced that Mr. Garland was duly elected, and the return thereof was made accordingly.

The Governor acted too early, and, in his action upon the returns before him, erred in making up this abstract, and, consequently, in his return of the election.

It *is* provided that the Governor may act before the expiration of the thirty days, if all the returns have been received; but, by *returns* is here certainly meant such returns as are required by the law, made by the clerk and two justices of the peace, or two householders, who had been sworn

to faithfully and impartially perform the duty, and no such returns had been received by the Secretary of State, on that day, from the county of Arkansas; therefore, he ought to have delayed until the last day allowed by law. If he had done this, he would have been compelled to return that Mr. Johnson had been duly elected.

This last day we have seen was either the 11th or the 13th of December; and on the 11th of the month we have seen that a perfect and true abstract of the votes of the county of Arkansas, in all respects conformable to the law, was returned and filed in the office of the Secretary of State, and, therefore, ought to have been contained in the statement or abstract which the Governor and Secretary of State were required to make of the votes of the several counties of the district, and the abstract so made would have shown that Mr. Johnson had received in the district eight votes more than Mr. Garland.

This will be manifest, by the inspection of this abstract of the returns of the district, and the short calculation. On this abstract, it is stated that Mr. Garland received in the county of Arkansas 175 votes, and in the entire district 2,157 votes. That Mr. Johnson received in the county of Arkansas 73, and in the entire district 2,125 votes. This showed that Mr. Garland had a majority of 32 votes in the district. But by the true return from the county of Arkansas, it appears that Mr. Garland received in this county 195 votes—an addition of 20—which, added to the number it is shown on the general abstract he had received in the district, made the total number of his vote 2,177 in the district. But it is shown by the same document, that Mr. Johnson had received, in the county of Arkansas, 133 votes, instead of 73, as stated on the Governor's abstract—an addition of 60 votes, which increased his total vote in the district by this number, and proves that he received 2,185 votes in the district, and had, therefore, received in the district a majority of eight votes over Mr. Garland.

It was contended in argument by the honorable gentlemen, that if we used the abstract of the Governor for any purpose, we must admit the truth of its statements in every particular, and could controvert no part thereof. But it is hardly necessary to refute this position. We present it all as *prima facia* evidence, and thereupon charge and sircharge,

and support our allegations by inspection and our proofs. The case is too familiar in the practice of law, and obvious to common sense to require authority in its support.

The learned gentleman by the introduction of what he calls this intermediate return, and his skillful criticism upon all the documents in relation to the vote of Arkansas county produced, what he seemed to consider, a confusion and uncertainty; and, in this State of the matter, contended that the decision and return of the Governor ought to be final. But the Governor had nothing before him but the documents we have here certified by his Secretary, with his own certificate—that it is in due form, and upon the returns here found, this House must judge for itself. In doing this, it has only to discard whatever is invalid or nought, and only caculated to produce this confusion, and all is clear. But if the gentleman will have it considered that there is a confusion and uncertainty in respect to the vote of Arkansas county, and that effect must be given to this uncertainty, then we propose that all the returns from this county be rejected. There is no uncertainty or controversy in respect to the remaining counties, and the abstract of the votes in them will show that Mr. Johnson received a plurality of seventy votes cast and returned in the district over all of his competitors.

But we maintain there is no such uncertainty, unless some technical objection to our proofs is allowed effect, and some doubts having been expressed upon this matter, we propose before the Committee, on our affidavit, the most effectual mode of removing it. We propose in effect, that all the returns of the several townships of the county of Arkansas, on which the clerk of the county and his associates had acted, should be transcribed and brought up for the inspection of this House.

But the gentleman rejected our proposition, and persisted in insisting on the benefit of the supposed confusion.

(*Case on the Act of Congress and the Proceedings he e.*)

Thus much on the proofs on the supposition that it was necessary that the case of Mr. Johnson should be made out by proof of his allegations. This position, it will be recognized, was the first in the regular order, and this was the order of the discussion; but we here proceeded first upon the

proofs. This we did, because as we before said, Mr. Johnson never would have asked for the seat in this House had he not believed he had received the highest number of votes in all the district. Now, this having been done, we will proceed with the argument which, as we have said, was first in order.

This argument will be found in no respect inconsistent with the fact on which the other was founded, it will differ from it only in the mode by which will be established the general fact that Mr. Johnson was duly elected by a majority of the district; this will be here proven by the presumptions established by our excellent laws. The argument will be an independent one, and must, therefore, be fully stated.

These are our propositions and positions:

1. Mr. Johnson, the contestant, did, within the time prescribed by law, give to Mr. Garland, the sitting member, legal notice of his intention of contesting the election, and of the grounds thereof.

2. Mr. Garland wholly neglected to return to Mr. Johnson the answer prescribed and required by law, or any other answer whatever.

3. In this condition of the case, neither the parties was authorized by the Statute, or other law, to take any testimony; and it was not necessary for Mr. Johnson to produce any evidence of the allegations in his notice. They are considered tacitly admitted, and held to be true, for all the purposes of the case.

4. If it should be supposed that any proof is necessary, in addition to these presumptions of the law, to entitle the contestant to the seat and membership in this House, then we maintain that the proofs in the record are abundantly sufficient, whatever would have been required, had the sitting member answered the notice of the contestant, and thereby made up an issue of fact for trial upon evidence.

The law, and all the law, in relation to contested elections, is the act of Congress of the United States, passed in the year 185–, and adopted by the comprehensive act of the Confederate Congress, on the ——— day of Feb'y, 1861.

We will set out the statute. Its application to the case will require but ordinary attention. It will be found at once, we suppose, decisive.

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(*Contested Elections in Congress.*)

14. Whenever any person shall intend to contest an election of any member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the member whose seat he designs to contest of his intention to contest the same, and, in such notice, shall specify, particularly, the grounds upon which he relies in the contest.

15. Any member upon whom the notice mentioned in the first section of this act may be served, shall, within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election, and shall serve a copy of his answer upon the contestant.

16. When any such contestant or returned member shall be desirous of obtaining testimony respecting such election, it shall be lawful for him to make application to any judge of any court of the United States, or to any chancellor, judge or justice of a court of record of any state, or to any mayor, recorder or intendant of any town or city, which said officer shall reside within the congressional district in which such contested election was held, who shall thereupon issue his writ of subpœna, directed to all such witnesses as shall be named to him, requiring the attendance of such witnesses before him, at some time and place named in the subpœna, in order to be then and there examined respecting the said contested election, in the manner hereinafter provided

17. Every such witness shall be duly served with such subpœna, by a copy thereof being delivered to him or her, or left at his or her usual place of abode, at least five days before the day on which the attendance of the witness is required: *Provided*, That no witness shall be required to attend an examination out of the county or parish in which he or she may reside, or be served with a subpœna.

18. Any person summoned in the manner hereinbefore directed, and refusing or neglecting to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit and pay the sum of twenty dollars, to be recovered,

with costs of suit, by the party at whose instance the subpœna was issued, and for his use, by an action of debt, in any court of the United States, and shall also be liable to an indictment for a misdemeanor, and punishment by fine and imprisonment.

19. The party at whose instance such subpœna may be issued, shall, at least ten days before the day appointed for the examination of the witnesses, give notice, in writing, to the opposite party of his intention to examine witnesses, which notice shall contain a statement of the time and place of the proposed examination, the name of the officer who shall conduct the same, the names of the witnesses to be examined, and their places of residence, which notice shall be served by leaving a copy with the person to be notified, or at his usual place of abode: *Provided*, That neither party shall give notice of taking testimony at different places at the same time, or without allowing an interval of at least five days between the close of taking testimony at one place and its commencement at another.

20. All witnesses who shall attend in obedience to said subpœna, or who shall attend voluntarily at the time and place appointed, of whose examination notice has been given as provided in the next preceding section, shall then and there be examined on oath or affirmation, by the magistrate who issued the subpœna aforesaid, or in case of his absence, by any other such magistrate as is authorized by this act to issue such subpœna, touching all such matters and things respecting the election about to be contested as shall be proposed by either of the parties aforesaid, or either of them, or by their or either of their agents; and the testimony of the witnesses, together with the questions proposed by the parties or their agents, the said magistrate is hereby authorized and required to cause to be reduced in writing, in his presence, and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively; after which he shall immediately transmit by mail the said testimony, duly certified under his hand, and sealed up, to the clerk of the House of Representatives for the time being, together with a copy of the subpœna and of the notice served upon the party, as provided in the preceding section, and of the proof of the service of such notice.

21. The said magistrate shall have power to require the

production of papers; and on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to said election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, he shall be liable to all the penalties prescribed in the fifth section of this act; and all papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by said magistrate, with the testimony of witnesses, to the clerk of the House of Representatives.

22. The testimony taken by the parties to the contest, or either of them, shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer mentioned in the first and second sections of this act; and no testimony shall be taken after the expiration of sixty days from the day on which the answer of the member returned shall be served upon the contestant; and a copy of the notice of contest, and of the answer of the returned member, shall be prefixed to the depositions taken, and transmitted with them to the clerk of the House of Representatives: *Provided*, That the House may, at their discretion, allow supplementary evidence to be taken after the expiration of said sixty days.

23. When no such magistrate as is by the third section of this act authorized to take depositions shall reside in the congressional district from which the election is proposed to be contested, it shall be lawful for either party to make application to any two justices of the peace residing within the said district, who are hereby authorized to receive such application, and jointly to proceed upon it in the manner hereinbefore directed.

(We have copied from Brightly's Digest, Page 254, but see 9 Statute at Large, 568, 19th February, 1851.)

The effect of this act upon the case will be now shown, and the question upon the constitutionality of the enactment, unexpectedly suggested, demonstrated, by both interpretation and authority, we expect, beyond all doubt.